United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2069

Original

To be argued by
STANLEY L. KANTOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

DONALD WALLACE, et al., on behalf of themselves and all others similarly situated who have matters pending in the Criminal Term of the Supreme Court of the State of New York, Kings County,

Plaintiffs-Appellees,

against

MICHAEL KERN, OLIVER D. WILLIAMS, JACOB J. SCHWARTZWALD, individually and as Justices of the Supreme Court of the State of New York, Kings County and VINCENT D. DAMIANI, etc., et al.,

Defendants-Appellants.

THE UNITED STATES OF AMERICA ex rel. MICHAEL A. McLAUGHLIN, et al.,

Plaintiffs-Appellees,

against

THE PEOPLE OF THE STATE OF NEW YORK, THE PEOPLE OF THE CITY OF NEW YORK, THE CHIEF PRESIDING, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, et al.,

Defendants-Appellants.

MICHAEL A. McLAUGHLIN, et al.,

Plaintiffs-Appellees,

against

THE PEOPLE OF THE STATE OF NEW YORK, et al.,

Defendants-Appellants.

[ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK]

BRIEF FOR STATE DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FILED
MAY 8 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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[On Appeal from the United States District Court for the Eastern District of New York]

BRIEF FOR STATE DEFENDANTS-APPELLANTS

Preliminary Statement

Defendants-Appellants, Judges, Justices, Court personnel and the District Attorney of Kings County (hereinafter "defendants") appeal to this Court from certain

provisions of a final judgment, dated March 25, 1975, of the United States District Court for the Eastern District of New York (JUDD, D.J.), insofar as it mandates new bail practices in the Kings County Criminal and Supreme Courts. The final judgment was entered on March 26, 1975 and was based on a memorandum decision dated February 14, 1975. State defendants' notice of appeal was filed on March 28, 1975. The decision appealed from is not yet reported.

Questions Presented

1. Did the order of relief granted by the District Court violate traditional and well-established principles of comity, federalism, and equity when plaintiffs have adequate remedies at law and the relief ordered interferes with the state criminal, process, mandating rules of practice for the state courts?
2. Do the bail setting practices of the Kings County Criminal and Supreme Courts violate plaintiffs' rights under the Eighth and Fourteenth Amendments and if so, are the procedures ordered by the District Court mandated by the federal Constitution?
3. When plaintiffs attack custody which allegedly results from unconstitutional bail practices, is habeas corpus the exclusive remedy?

Statement of the Case

A. Prior Proceedings

The instant appeal involves, as the District Court noted:

> ". . . another effort to enlist the help of the federal courts in making the state criminal justice system work better." (A. 362)*

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* Numbers in parentheses preceded by the letter "A" refer to pages of the appendix.

This case, which has been before this Court twice previously on appeals from preliminary injunctions,* is now before this Court on appeal from the lower court's final judgment mandating certain bail practices in the Kings County Criminal and Supreme Courts.

The procedural history of the case at bar to the point of the second appeal to this Court is summarized in the opinion of this Court in Wallace II, and for the sake of brievity will not be repeated here.

Suffice it to state that the action was commenced on July 11, 1972 by the filing of a *pro se* complaint in *Wallace;* that the complaint, as twice amended, set forth eight purported causes of action against Kings County judges, the Kings County District Attorney, various New York City Officials, and the Legal Aid Society. Prior decisions in this case have dealt with the adequacy of Legal Aid representation, the refusal of the court to calendar *pro se* motions (Wallace I); and with lengthy pre-trial delays (Wallace II). In both instances the District Court granted preliminary injunctive relief, and in both instances this Court reversed.

B. Hearing on Pretrial Release Claims

While Wallace II was *sub judice* in this Court, the District Court proceeded to hear and decide plaintiffs' claims regarding the bail (pretrial release) practices in the Criminal and Supreme Courts, insofar as they were challenged in plaintiffs' third and seventh causes of action (2d Amd. Compl. ¶¶ 14-16, 28-32).

Plaintiffs alleged that their pretrial incarceration resulted from unconstitutional bail practices in the Kings County Criminal and Supreme Courts (¶ 2). They claim that defendants violated their rights under the Eighth and Fourteenth Amendments by recommending and denying

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* *Wallace* v. *Kern,* 481 F. 2d 621 (2d Cir. 1973); *Wallace* v. *Kern,* 499 F. 2d 1345 (2d Cir. 1974). For fuller discussion of these decisions, see *post* at 18-19.

them release on their own recognizance (ROR) when the imposition of monetary conditions is unnecessary to assure their appearance and by recommending and denying them bail when such denial is unnecessary to assure their appearance (¶¶ 15-16). Plaintiffs sought to have these practices declared unconstitutional (Demand 2); to enjoin defendants to accord them their rights (Demand 3); and to require a plan to assure their rights to reasonable bail and due process (Demand 4).

At the hearing, which lasted seven trial days, beginning July 25, 1974 and concluding October 18, 1974, plaintiffs produced six individuals who were or had been under indictment in Kings County; four Legal Aid attorneys plus the attorney-in-charge of the Criminal Division of the Legal Aid Society; two judges; two law professors; a psychiatrist; a sociologist; and a former Commissioner of the Temporary State Commission on the Administration of the Courts.

1. *The Prisoners*

Six prisoners testified for the plaintiffs: Keith Ryan (T.A. 6-52; T.B. 6-55),* Leon Johnson (T.B. 55-93, 134-37), Ronald Sumter (T.B. 198-254), Richard Burrus (T.B. 94-134), Ronald Foy (T.B. 393-443), and Peter Rivera (T.B. 475-92, 529-40). Each testified to the bail setting practices employed in his case; the effect on him of pretrial detention, and his ability to consult with his attorney.

Keith Ryan was charged by the grand jury in a fifteen court indictment which included robbery I and II, grand larceny, assault, and possession of a dangerous weapon

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* Numbers in parentheses preceded by the letters "T.A.", "T.B.", "T.C.", "T.D.", or "T.E." refer to pages of the transcript *not* included in the appendix. As the transcript is not numbered consecutively the letter "A" has been used to designate the July 25, hearing; "B" for July 29-31; "C" for September 13; "D" for September 18; "E" for October 18.

(T.A. 7). He had been previously convicted of two misdemeanors and the disposition of a third was open (T.A. 13). Bail was set at $25,000 (T.A. 17) and reduced to $15,000 at his Supreme Court arraignment (T.A. 22). The indictment was dismissed and then reinstated. In April, 1973 Mr. Ryan was rearrested on the indictment and was also arrested for murder, stemming from the death of his brother in the course of the robbery (T.A. 28-32). He was held without bail upon arraignment for murder (T.A. 35). His case had not yet been called to trial although it was marked "ready" (T.A. 48).

Lee Johnson was arrested for possession of a weapon, criminal impersonation, and attempted escape and was held in lieu of $1,000 bond or a $500 cash alternative (T.B. 55, 60, 64, 69, 70, 79, 137). At the time of his arrest he was on probation from a conviction for attempted robbery, which probation was ultimately reinstated (T.B. 57-58, 85). In addition to a prior felony conviction, he had two youthful offender convictions (T.B. 57). Bail was set at $1,000 by the lower court and the cash alternative was granted upon motion at his Supreme Court arraignment (T.B. 69-70).

Richard Burrus was awaiting sentence on a plea of guilty in a case involving robbery, kidnapping, and sexual abuse (T.B. 94, 96, 120, 132). He was arrested and charged with possession of a stolen automobile and possession of a weapon (T.B. 95). While on release, he was rearrested for robbery, kidnapping, and sexual abuse (T.B. 95-96, 120). Bail was set by the Criminal Court at $35,000 (T.B. 99). He was rearraigned upon indictment and bail was reduced to $10,000 bond (T.B. 101-102). His bail was later reduced to $7,500 (T.B. 113).

Ronald Sumter was sentenced to fifteen years on a conviction for robbery. He was initially arrested for criminal possession of a dangerous drug and bail was set at $500; he made bail and was released three or four days later

(T.B. 199-200). Bail was continued by the Supreme Court (T.B. 200). Mr. Sumter was later arrested for robbery and bail was set at $5,000 (T.B. 206-207). Bail reduction was denied at his preliminary hearing but granted at his Supreme Court arraignment, when it was reduced to $3,500 (T.B. 208-209). He was arrested on yet another charge and bail was set at $7,500 (T.B. 211). Mr. Sumter had a prior conviction for attempted robbery and four misdemeanor convictions (T.B. 250-51). He was found guilty on the robbery indictment after a trial by jury and received a fifteen year sentence. He pleaded guilty to the first charge and received a one year concurent sentence and was acquitted of the last charge (T.B. 226, 235, 238, 239, 241).

While an earlier conviction of Ronald Foy's was on appeal, he was arrested for burglary; bail was set at $500 and posted by a friend (T.B. 394, 396). Bail was continued at the Supreme Court arraignment. While out on bail, he was arrested for robbery and bail was set at $5,000 at the initial arraignment (T.B. 397-98). When a co-defendant on the burglary charge pleaded guilty and attempted to exonerate him, bail on the burglary charge was reduced to one dollar and bail on the robbery charge to $1,000 (T.B. 398, 405, 411). Mr. Foy had previously been convicted of grand larceny and a misdemeanor drug offense (T.B. 424).

Peter Rivera was under a felony indictment for robbery I and II, burglary I, and grand larceny II (T.B. 531). The Supreme Court fixed a $7,500 bond with a $1,000 cash alternative (T.B. 478-79). Mr. Rivera had a previous felony conviction and had received youthful offender treatment (T.B. 531, 533). Approximately two weeks before he testified in this case, he made bail (T.B. 491).

2. *The Judges*

Plaintiffs called two members of the state judiciary to testify. Judge William H. Booth of the Criminal Court

of the City of New York was the first to testify. Mr. Justice Irwin Brownstein of the Supreme Court of the State of New York also testified.

Judge Booth had been a Criminal Court Judge for 5½ years at the time of trial and had been assigned to Brooklyn for the last four years. The Judge discussed the problems of establishing all purpose parts in Brooklyn, a concept similar to the modes of practice instituted in the Southern and Eastern District of New York wherein a matter is assigned to a single Judge for all purposes (A. 47-50).

Judge Booth testified that arraignment in Criminal Court takes a "couple of minutes". Charges are read, bail is set and a date for a preliminary hearing is established. At the bail setting determination, while some prosecutors do not consider it their function to make recommendations, most of them do, and always speak on the question (A. 52). In speaking on this issue, they point to the nature of the crime charged, the probability of conviction, and the NYSIIS report (A. 53). The judge has before him the NYSIIS report, the complaint, and the PTSA report* (ROR report), the function of which is to provide background information and to recommend which defendants are to be RORed. The PTSA sheet contains the defendant's address, length of residence, who else lives with him, what his work record is, his age and date of birth, on occasion warrants or other information, and a box for verification (A. 53, 54). Most of NYSIIS reports are lacking in dispositions at arrests (A. 54). At arraignment, Legal Aid lawyers (and presumably, retained counsel as well) urge that there have been no dispositions, that the

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* The NYSIIS report is a report of prior arrests and dispositions prepared by the New York State Identification and Intelligent Service (now Division for Criminal Justice Services), based on fingerprints. "PTSA", refers to the Pre-Trial Service Agency, a state-federal funded agency operating in Kings County.

defendant has been working; in essence, they do not add anything to what the Court already has before it, although sometimes the Legal Aid Community Defender's Office has more information about the defendant (A. 56-57).

In evaluating the facts before him for bail purposes, Judge Booth affords great weight to the ROR verification, but his sense is that most of them are not verified (A. 54). As for open dispositions on the NYSIIS report, no weight at all is given to them, though the Judge gratuitously offered that some judges do give weight to prior arrests (A. 55). On occasion, according to Judge Booth, the police officer, defense counsel, or PTSA will have up-dated information (A. 56).

In addition to the above factors, in the Judge's view, a family's presence in Court influences his determination, especially in youth cases. He states on the record the reasons for a particular determination (A. 58), in accordance with Judge Ross's directive. Judge Booth further stated that no attorney has ever asked for an evidentiary hearing on bail, although he would like to have more information (A. 60).

A preliminary hearing is held two or three weeks after arraignment, after an average 3.2 adjournments of four days each. Bail is reviewed at this proceeding. At the preliminary hearing, new information is brought out including up-dating on dispositions and verification of ROR reports (A. 63). On many occasions, based on the supplemental information, a defendant is RORed or bail is reduced or a cash alternative is set (A. 63).

The Judge also testified that while seven types of bail are set by the law, for practical purposes, only two are used: insurance company bonds and cash bail. Attorneys never ask for anything further, except in rare instances (A. 65). The Judge also testified that whenever a person appears before him, he examines bail, because it is his duty (A. 68).

In addition to the reviews in the individual parts, the Administrative Judge for the City has established a system whereby the Borough Administrative Judges review bail papers to see if there is any reason for changing bail (A. 69-70).

On cross-examination, Judge Booth testified that while a case is in Criminal Court, there is always an opportunity to review bail. Judge Booth testified that because of the incrimination factor, he doesn't usually question the defendant but rather allows the attorney to speak. If a defendant wished to speak and the attorney had no objection, he would permit him to do so and has permitted defendants to speak on their family background (A. 76-77). While he testified that an evidentiary hearing is essential, the reason given was that the presence of the oath inhibits perjured statements from witnesses (A. 78). The Judge also testified that by the first appearance after arraignment about half of the defendants are out, and subsequently two-thirds are released "because of the additional information" received (A. 79). There are a variety of reasons why a defendant is detained, the principal one being that he can't post bail, no matter how low it is. In addition, there may be holds on him from other courts (A. 79-80). The Judge testified that prior felony convictions have an effect, as do open indictments, but to a lesser extent* (A. 80). Finally, the Judge testified to appearance rate before him. He stated that he issues a warrant a day, while other Criminal Court Judges issue 10-20 warrants a day (A. 69).

The plaintiffs also called Irwin Brownstein, a Justice of the Supreme Court in Kings County for the past five and a half years (A. 89-90). Judge Brownstein has conducted between 1,000 and 1500 arraignments. He testified

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* A prior felony conviction, while in itself does not raise the likelihood of a greater risk of non-appearance, does increase the defendant's exposure to a long sentence if convicted, because of multi-felony offender treatment, and therefore creates a greater risk of flight.

that the practice on arraignment was generally the same as that in Criminal Court, except that information is more complete; more ROR sheets are verified, and the Court has access to the grand jury minutes so as to better gauge the seriousness of the crime charged and the likelihood of conviction. Despite this increased information, the Judge observed that the same bail is often continued (A. 90-93, 96-99).*

Like Judge Booth, Judge Brownstein indicated that a defendant on the street does better at trial than a detainee, though for different reasons (A. 108).**

Judge Brownstein, after detailing the efforts made by the defendants in this case to improve the administration of the Courts, stated that in Kings County Supreme Court bail reviews are mandated every ninety days. In addition, bail reviews are held on counsel's request, and there is a Special Part where Judge Barshay reviews bail determinations, to avoid the necessity of applications to the Appellate Division (A. 118). Judge Brownstein also testified that both he and many of his colleagues state reasons, but added that it is difficult when a judge is processing 30 to 50 arraignments a day*** (A. 119).

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* The Judge noted that part of the reason is the calendar pressure of going through 50 arraignments a day. On the question of evidentiary hearings, the Judge stated it would be helpful, but "[w]hether it's realistic is another question. In Part I in Kings County I may have 120 cases on in a day" (A. 97).

** The Judge also noted that since likelihood of conviction is a factor considered in setting bail; chances of low bail, and hence release, are greater where the District Attorney's case is weak (A. 109).

*** It should be noted that if a judge spent only 3 minutes on each arraignment it would consume two and a half hours every trial day. If he spends only five minutes, it would consume over 4 hours for each trial day. If hearings were required and only ten minutes were allowed for each side to present its case (half the maximum allowed by this Court for oral argument), then the Court would have to sit from 8 a.m. to midnight, without recess, in order to complete its calendar.

On cross-examination Judge Brownstein stated that although it is the prosecutor's duty to make a recommendation on bail, he does not always follow it and the weight he gives the District Attorney's recommendation depends on whether or not the Judge agrees with it. Unlike Judge Booth, Judge Brownstein encourages defendants to address the Court regarding their personal circumstances, but many are reluctant to do so (A. 143). The Judge tries to find out whether he sees his family, and what he would do if released. The Judge stated (A. 144): "If I believe he's going to return, that's no. 1 on the priority." The Judge stated that although he did not know what was important to the Criminal Court Judge in setting bail, he has the same (if not more information) that the Criminal Court Judge has (A. 144). He also stated that he is not bound by the bail set by a Criminal Court judge and frequently sets bail different from that set below and indeed reviews his own bail determinations and changes them at times (A. 146).

In addition, defendants called Justices Damiani and Barshay. Judge Damiani is the Assistant Administrative Judge in charge of the criminal branch of Supreme Court, Kings County and Richmond County (A. 209). As Administrative Judge, he is responsible for all housekeeping functions—in effect, keeping the 37 parts on the criminal side functioning smoothly. In testifying, he supplemented his testimony given in July, 1973. He described the organization of the Court, the efforts made to cut down the backlog in Supreme Court, and the procedures used in the Court in determining and reviewing bail.

Regarding the setting of bail, the Judge's testimony comported with that of Judge Brownstein, except that the Judge did not think that putting a statement of reasons on the record is that important (A. 282), since the defendant's counsel or the defendant is present and can apprise the Court of what happened below (A. 283). In addition, according to Judge Damiani, the Supreme Court arraigning

judge has before him all the papers that the Criminal Court judge has before him, and any obvious errors will be caught.* The Judge stated that in practice, although the Supreme Court Justice has the power to set bail *de novo,* the tendency is to continue the bail below unless there is a change in circumstance.

Within ten days to two weeks after arraignment, the case is assigned to a conference part,** where attempts are made to arrange possible dispositions. Present are a Judge, Assistant District Attorney, and the defense attorney. Bail can be reassessed at this time (A. 215). If there is no disposition, the matter is assigned to a trial part. As before, the trial part accepts oral, as well as written applications to change bail† (A. 215).

If a defendant is still unsatisfied with the bail determination, a review can be held by one of the Senior Judges, Judge Barshay, Judge Starke, or Judge Damiani. While he can make unlimited applications in Part 10, Judge Damiani observed that unless there are changes in circumstances, bail will not be changed after the first application (A. 216). If a defendant is still unsatisfied, he can then go to the Appellate Division.

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* Judge Damiani testified that there is still, at the Supreme Court stage, a problem with dispositions on the NYSIIS sheet. He asks the defendant about blank dispositions and has found their representations accurate most of the time. Defendants do not lie because they know their statements can be and will be checked. In such cases Judge Damiani fills in the disposition with a question mark, meaning it is unverified (A. 211, 214).

** On June 18, 1974, Judge Damiani submitted a report to Judge Sandifer. The report detailed the results on conferences held to June 14. There were 968 cases conferenced, resulting in 255 dispositions and 86 bail reductions (A301-304).

† The written application need not take any specific form and can merely be a letter from the detainee which is placed on the Part I Calendar (A. 215).

In addition to these normal procedures, there are numerous avenues for bail review. Pursuant to the request of Chief Judge Breitel in May and June of 1974, old cases were recycled back to the conference parts and bail review was held in all jail cases 18 months or older. At the time of trial, the Court was recycling cases 12 months old or older. Finally, for many years every detainee was brought before the Court for bail review in June and December (A. 219, 246).

On cross examination, Judge Damiani detailed the efforts made to speed dispositions, reducing the number of defendants awaiting trial detained for nine months or more 36.5% from 547 in February 28, 1974 to 347 on July 31, 1974; of those detained six months or more, 31.8% between February 28, 1974 and July 31, 1974. He informed the Court as to the number of cases pending (3300) and the number of Kings County indictments (fiscal 1972-73, 9077 defendants, as compared to fiscal 1973-74, 6720) (A. 229, 239). Judge Damiani testified that the average arraignment takes five or ten minutes in Supreme Court, not 90 seconds and that while reasons are not written, they are given on the record. While the arraignment minutes would presumably be helpful, it would not be worth the expense, as the basic facts are before the reviewing judge in any event. Their absence does not adversely affect the likelihood that the defendant would get a bail reduction (A. 282-283).

The Judge also testified that in setting bail the most important criteria is whether the defendant is going to appear for trial. The Court looks at the nature of the charge, his record, the defendant's exposure, and roots in the community (A. 283, 286). The Judge felt that it was helpful to have relatives, church people, and community groups before him (A. 287).

Finally, on the issue of bail, Judge Damiani testified that at one point a directive had been issued requiring a reduction in bail for those incarcerated every 90 days, but this had been abandoned (A. 293-294).

Hyman Barshay, a retired Supreme Court Justice, who sits under an Appellate Division certificate, has 50 years at the bar, and twenty-four years on the bench, twenty-two of which on the Supreme Court criminal level. Judge Barshay has sat in Trial Term II, a murder part, and Special 10, the bail review part, for the past 3 years (A. 319-320).

After explaining the purpose of Part 10, Judge Barshay noted that the part is regularly held on Mondays and Thursdays and at any other time requested as long as it doesn't interfere with an ongoing trial (A. 320-321). A case is put on the Part 10 calendar either *pro se,* by communication to the Clerk or the Judge, or by counsel with notice to the District Attorney. Normal motion papers are not necessary (A. 321).

During the bail reviews, at which the appearance of counsel is preferable but not mandatory, others are permitted to address the Court, although no oath is required. In evaluating the bail determination, Judge Barshay not only takes the statutory requirements into account but also the length of time the defendant has been incarcerated. There is also no limit on the number of bail applications permitted in Part 10, and some detainees apply reasonably often (A. 322-324).

The Judge then outlined for the Court the work of Part 10 from January, 1974 to September 10, 1974. As drawn from the record the figures show (A. 324):

Month	*Number Applications*	*Number Granted*	*% Granted*
January	47	33	70.2
February	42	25	59.5
March	48	34	70.8
April	46	29	63.0
May	34	26	76.6
June	63	52	82.5
July	83	65	78.3
August	62	45	72.5
September*	11	10	90.9
Total	436	319	73.1

Bail reduction motions may be heard in Part 10 immediately after the case is assigned to a trial part, and while evidentiary hearings would be granted if requested, no such applications had ever been made (A. 325-326).

On cross-examination Judge Barshay explained that Special 10 proceedings vary in length of time and are based either on a summary from counsel or the defendant, if *pro se,* or on papers. He requires defense counsel to up-date the NYSIIS sheet and requires counsel to be prepared. In evaluating the motion, he considers convictions and arrests, although the latter to a lesser extent (A. 334-336). Finally, Judge Barshay testified that he uses all of the statutory forms but the most common is cash and surety bond, cash being used where he feels it's safe (A. 348-349).

3. *Others*

Dick Ryken, the former director of PTSA also testified. PTSA, which at time of trial had been operating in Kings County for some thirteen months, is composed of four

* September 1-10 only. The Judge had no statistics on the actual number released.

arms: hour-by-hour evaluations (preparation of ROR reports), a limited supervised release program; a service office to those awaiting interviews; and a research arm (A. 169-171).

The interviewing crew, which works 24 hours-a-day, in the precincts and in Criminal Court, collects two pages of detailed personal information concerning a defendant's employment, family ties, length of residence, an incidental information, including convictions. After the interview is completed, the information supplied by a defendant is verified by telephone and a point system is applied. If the defendant obtains six points, then PTSA recommends ROR. If the information cannot be verified but the defendant has the six points, he is rated "qualified". Otherwise no recommendation ("stamped space blank") is made or, if the defendant does not respond, that is so indicated (A. 170-172).

In the course of its history, approximately 43% of those interviewed are recommended and verified, 26% qualified, 15-20% no recommendation, leaving 22-27% in miscellaneous categories. At arraignment a PTSA representative is present to aid the Court and answer questions the Court may have regarding ambiguities; or if services are necessary, to offer those services (A. 173-174).

At arraignment 46% of those qualified as RORed, as well as 20% of those for whom no recommendation was made (A. 176). There is an overall ROR rate of 43% initially, with an additional 10-15% RORed subsequently (A. 176). Of the numbers released, there is an overall approximate 8% skip rate, and a 4% willful skip with those being recommended being 2% willful, qualified 5% and no recommendation being 7-8% (A. 176-177). In terms of actual numbers, for a six-month period ending April 29, 1974, the total number of appearances was 11,816, making approximately 500 willful non-appearances, and of those recommended and verified, there were 6,642 scheduled appear-

ances with over a hundred willful non-appearances* (A. 204).

Jethro Eisenstein, a lawyer and teacher of clinical law at NYU, emphasized the importance of the Pre-trial Services Agency and the aid in getting a defendant RORed when the sheet is verified. He outlined the attempts he and his students make to verify roots when the ROR sheet is not verified, as well as to ascertain dispositions on NYSIIS sheets (T.B. 450-452). He also testified that, at least at the Criminal Court level, the arraignment decision is most important and judges on subsequent reviews tend not to disturb it (T.B. 456-457). This despite PTSA data to the contrary (T.B. 469).

Other witnesses included Edna Schwartz, James Yates, David Gordon, and Weldon Brewer, attorneys employed by Legal Aid. They testified to their experiences regarding bail, inmate production, and interviewing facilities. Two assistant district attorneys also testified.

Dr. Steven Teich, a psychologist, testified as an expert to the effects of long-term (11-12 months) pre-trial incarceration. He stated that incarceration brings about feelings of passivity; helplessness and impotency (T.B. 320); frustration giving rise to anger, hostility and infantile regression (T.B. 326-327).

Eric Single, the author of the so-called "Bellamy" study also testified.** Based on a study done in 1973 of completed felony cases in New York County, Mr. Single stated that there was a strong correlation between detention and out-

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* Based on these figures, the aggregate non-appearance rate was 945 over all for those RORed. In the witness's records "substantial numbers".

** An updated "Bellamy" study (*post* at 52) is presently being used as part of a similar civil rights action pending in the United States District Court for the Southern District of New York. *Roballo* v. *Ross*, 74 Civ. 2113 (MEL), filed 5/16/74.

come (T.B. 375-378). Harry Subin, a law professor at NYU also testified (T.B. 492). He gratuitously offered his opinion as to (1) the legality of the use of money bail, which he said constituted a deprivation of equal protection; and (2) the constitutionality of the New York statute, which he thought did not provide basic due process (T.B. 501-509).

In addition, plaintiffs called Robert Patterson, who testified as to the recommendations of the Temporary Commission of the New York State Court System and the Commission's and his concept on how the bail system *should* work (T.B. 546-555).

Prior Decisions of this Court

On June 27, 1973 an appeal from Judge Judd's order of May 10, 1973, granting certain modes of relief regarding *pro se* motions and the adequacy of Legal Aid representation, was heard in this Court. The same day the Court (*per curiam,* per LUMBARD, HAYS and TIMBERS, C.JJ.) reversed Judge Judd's order. As subsequently printed, the Court held simply that while it was sympathetic with the purposes of the District Court, no jurisdiction lay against the Legal Aid Society, and that under principles of comity (see Point I, *infra*), the district court was without power to intervene in internal state court procedures. *Wallace* v. *Kern,* 481 F. 2d 621, 622 (2d Cir. 1973), *cert. den.* 414 U.S. 1135 (1974).

On April 25, 1974 this Court (LUMBARD, HAYS, C.JJ. and JAMESON, D.J.) heard a second appeal from a District Court order, which established a rule that each prisoner detained while waiting trial for longer than a six month (or nine month in murder cases) period be entitled, with certain exceptions, to demand a trial, and if not tried within forty-five days of the demand, to be released on his own recognizance. By a decision dated July 8, 1974 and amended

on October 4, 1974, this Court again reversed the order of the District Court. *Wallace* v. *Kern,* 499 F. 2d 1345 (2d Cir. 1974), *cert. den.* —— U.S. ——, 43 U.S.L.W. 3465 (February 25, 1975).

This Court held that which the District Court "gave lip service" to the four factors announced by *Barker* v. *Wingo,* 407 U.S. 514 (1974), it failed to analyze for each of them, and more importantly violated the Court's mandate to proceed on a case by case basis. 499 F. 2d at 1349.

The Statutory Bail System in New York

The relevant statutory scheme for the setting of bail in New York appears in Title P (Arts. 500-540) of the New York Criminal Procedure Law. When an accused initially comes under the control of the court, the court must, by a securing order, fix bail, order him released on his own recognizance (ROR), or commit him to the custody of the sheriff. § 510.10.* The accused must be accorded an opportunity to be heard at such proceeding. § 510.20.

The criteria to be considered in issuing such a securing order are described in § 510.30(2)(a):

> "2. To the extent that the issuance of an order of recognizance or bail and the terms thereof are matters of discretion rather than of law, an application is determined on the basis of the following factors and criteria:
>
> (a) With respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required. In determining that matter, the court must, on the basis of available information, consider

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* The various terms used in the proceedings are defined in § 500.10.

and take into account:

(i) The principal's character, reputation, habits and mental condition;

(ii) His employment and financial resources; and

(iii) His family ties and the length of his residence if any in the community; and

(iv) His criminal record if any; and

(v) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution; and

(vi) If he is a defendant, the weight of the evidence against him in the pending criminal action and any other factor indicating probability or improbability of conviction; or, in the case of an application for bail or recognizance pending appeal, the merit or lack of merit of the appeal; and

(vii) If he is a defendant, the sentence which may be or has been imposed upon conviction."

If release on recognizance is denied and bail fixed, eight types of bail are authorized—cash bail, an insurance company bail bond; a secured surety bond; a secured appearance bond; a partially secured surety bond; a partially secured appearance; an unsecured surety bond; and an unsecured appearance bond. § 510.10. If bail is fixed in amount without designating the form(s) in which it may be posted, it may be posted by an unsecured surety bond or an unsecured appearance bond. § 520.10(2)(a) (McKinney's Supp. 1973). The court may direct bail be posted in any one of two or more forms and may designate different amounts varying with the form. § 520.10(2)(b) (McKinney's Supp. 1973).

The avenues for reconsideration and review of an initial bail determination are numerous. Section 510.20(1) provides that:

> "at any time when a principal is confined in the custody of the Sheriff as a result of a previously issued securing order, he may make an application for recognizance or bail."

In effect, the accused is entitled to make unlimited applications to the court for reconsideration of a securing order previously issued. He may thus bring to the court's attention any new or additional evidence or circumstance which was not before the Court during the initial proceeding. § 510.20(a).

Any securing order issued by the New York City Criminal Court will be reviewed by the Supreme Court upon application of the accused. The Supreme Court can vacate the lower court's order and order release or bail, or fix bail in a lesser amount or less burdensome form. § 530.30(1). In addition, in Kings County, a person accused of a felony is ordinarily arraigned in the Criminal Court and rearraigned on the indictment in the Supreme Court. The Supreme Court will review the lower court's securing order and continue its effectiveness or issue a new order. § 530.40. An accused can always bring an application for a writ of habeas corpus (CPLR § 7002(5)), which proceeding is reviewable upon appeal. CPLR § 7011. The writ may be brought originally in the Appellate Division. CPLR § 7002(5).

Decision and Order Below

Following a memorandum and decision dated February 14, 1975 (A. 360-425), the District Court signed a final judgment, order, and decree (hereinafter "order") (A. 426-29). The order granted plaintiffs a declaratory judgment declaring the bail determining practices of the Kings

County Criminal and Supreme Courts violative of plaintiffs' rights to nonexcessive bail and to due process of law. The Court ordered that any pretrial detainee be entitled to a hearing at which the prosecution shall recommend the form of security necessary to assure the defendant's future appearance. If monetary bail is recommended, the prosecution must prove the need therefor and that alternative forms are not sufficient.* The defendant may present evidence negating the necessity for monetary bail. The hearing is to be held on five days' notice to the People, at any time after 72 hours after arraignment or at the next court appearance, whichever is sooner, or as new evidence or changes in fact may justify. Sixty days incarceration is deemed a sufficient change in facts to warrant a *de novo* bail hearing.

The Court also ordered that the state court must provide the defendant with a written statement of reasons for denying or fixing bail, including he facts relied upon. If such a statement is not provided, the defendant is entitled to a *de novo* bail hearing.

The Court denied plaintiffs' motion to enjoin the use of monetary bail as a condition of release; ordered certain of the defendants to submit a plan to assure privacy between an incarcerated defendant and his attorney at any court appearance, and ordered that the issue of the possible coercion of guilty pleas by reason of prolonged incarceration should be decided on a case by case basis. None of these last three portions of the order are being appealed.**

Beginning its factual analysis, the Court described the bail procedure in Kings County, which includes at a minimum six bail setting proceedings or reviews from the time

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* The Court did not specify which burden of proof standard was being imposed on the prosecution.

** The portions of testimony and District Court opinion relating to these three issues are accordingly omitted from this brief.

a defendant is arraigned in criminal court to the time the matter is assigned to a Supreme Court trial part (A. 367-368).* The Court concluded that more defendants would be released on their own recognizance or on low bail** if more information and more verified facts were available at an early stage (A. 369); and that "inadequate information and inadequate access to counsel" contributed to the presumably high bail that is set early in the proceedings (A. 368). According to the Court's findings, the two most critical characteristics looked at in establishing the proper mode of security were the defendants' prior record (NYSIIS report or yellow sheet) and his roots in the community and personal history (A. 368-69).***

The Court below found that although there were numerous stages at which a bail determination could be reviewed

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* According to the District Court opinion, between arraignment and indictment 45 days elapse, an additional week to two weeks elapse between indictment and Supreme Court arraignment, a few weeks later the case will be conferenced and within a few more weeks the case is assigned to a trial part. In contrast, Judge Damiani testified that a case is conferenced within ten days to two weeks of arraignment, and if no disposition is reached, the case is assigned immediately to a trial part (A214-215).

** The Court however does not designate or in any way define what it means by "low bail."

*** The defendant's prior record is establishing by use of a NYSIIS report prepared by use of an FBI fingerprint search. The district court found that while the arrests were accurate, 75-90% of the time the dispositions on these arests were incomplete (A. 368-69). However, the record is devoid of any evidence tending to show what percentage of arrests generally lead to convictions or that defendants, or their attorneys were denied an opportunity to put in evidence of dispositions, or that the prosecutor had greater access to the information concerning dispositions than did defendant or his attorney. Indeed, several of the Legal Aid attorneys testified that with efforts on their part they could fill in the dispositions. The Court found that most attorneys "lack time" to investigate dispositions or verify information (A. 370). The ROR sheet completed by the pre-trial services agency contains personal data on the defendant, which the agency services seeks to verify.

(A. 370), and that a defendant can make unlimited bail applications (A. 375), bail review at the Supreme Court level rarely results in the release of a defendant who had been held since his arrest, apparently because substantial weight is given to the criminal court determination, even though the basis for the lower court determination is not before the reviewing court (A. 370). Presumably, the Court defines "basis" as meaning the intellectual algebra involved in balancing the factors underlying the decision, for the actual factors underlying the determination (the complaint, ROR sheet and NYSIIS sheet) are all before the reviewing court, as are the prosecution, the defendant, and the defendant's attorney who were all present when the crminal court judge set bail.* Some measure of bail relief is available in Part 10, where Judge Barshay granted reductions in the majority of cases before him (A. 371).

Judge Judd credited Mr. Justice Brownstein's hearsay statement that many arraignment judges find a defendant's statement as to his arrest dispositions suspect (A. 370-71), although all members of the judiciary testified that they either disregard open cases on an arrest record, or find that in 95% of the cases a defendant's statement as to the dispositions are accurate. Indeed not one of the witnesses who testified stated that arraigning judges hold open arrests against a defendant when a defendant states a specific disposition.

The Court further credited though misconstrued the testimony of the director of the pre-trial services agency to the effect to 43% of all defendants are released on their

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* According to Justice Damiani, the absence of a statement of reasons does not adversely affect a defendant's chance to get bail. The lawyer should be able to tell you the same thing (A. 282-283). More importantly the attorney should be able to cure defects in the information before the court. Thus an attorney, if he is performing properly, should be able to inform the court on missing dispositions, or attempt to verify data on the ROR sheet.

initial appearance with an additional 10-15% released subsequently (A. 372).*

The Court also found certain forms of prejudice accruing from prolonged incarceration, including loss of witnesses because "it is difficult for a white lawyer or investigator to speak with persons in black or Hispanic communities" (A. 380).** Moreover, the Court noted loss of jobs, impairment of family relationships, and inmate personality changes (A. 380). The Court found, although without indicating the evidence relied upon, that a defendant's opportunity for parole, if convicted, is lessened (A. 381). Finally, the Court found that to some indefinable degree that trial results are likely to be less favorable for a detainee;*** and if convicted, that he is less likely to be given probation; and if given a jail term that it is likely to be longer (A. 381-82).

The Court concluded the factual portion of its opinion, stating that although prosecutors, Legal Aid attorneys, and members of the Judiciary were "striving valiantly" to achieve prompt trials, fair bail determinations, and all the accompaniments of due process, there were nonetheless "serious obstacles" in the present system (A. 385).

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* In point of fact this statement is clearly erroneous. The director testified that 43% of defendants were RORed on arraignment with an additional 10-12% released on recognizance at a later point. He did not provide any data on the total percentage "bailed" (A. 197).

** While such may be the case, there is no intrinsic bar to hiring black and hispanic investigators, and indeed federal law would mandate such. 42 U.S.C. § 2000e. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Moreover, it would appear that the prosecution would not be in less difficult straits.

*** To some extent, as the Court noted in *Bellamy* v. *Judges*, 41 A D 2d 196, 202 (1st Dept.), *affd.* 32 N Y 2d 886, *remittitur amd.* 33 N Y 2d 632 (1973):

> "It is not because bail is required that the defendant is later convicted. It is because he is likely to be convicted that bail may be required."

The Court begins its discussion of the law by suggesting that although there is some doubt that the Eighth Amendment prohibition against excessive bail is binding on the states, the New York State Constitution also provides a similar standard (A. 387). Reciting the standards announced in *Stack* v. *Boyle,* 342 U.S. 1 (1951); the New York Criminal Procedure Law § 510.30; the Bail Reform Act of 1966, 18 U.S.C. § 3146; and the ABA Standards Relating to Pre-trial Release (Approved Draft, 1968), the Court states that while bail is a matter of discretion, determined with reference to the facts in the individual case, it is excessive "where the amount is more than necessary to guarantee the presence of the accused at his trial." While the Court refused to hold that monetary bail is *per se* violative of plaintiff's Eighth Amendment rights, the final order (¶ 2, A. 426), declares that Kings County practices violate plaintiffs' right not to have excessive bail imposed.

Relying principally on *Wolff* v. *McDonell,* 418 U.S. 539; *Morrissey* v. *Brewer,* 408 U.S. 471 (1972); and *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole,* 500 F. 2d 925 (2d Cir. 1974),* as well as 18 U.S.C. § 3146(d) and F.R.A.P. Rule 9(b), the Court held that minimal due process for bail determinations mandates an evidentiary when requested and a written statement of reasons for denying or fixing bail (A. 402-414).

The District Court rejected defendants' assertion that principles of comity barred federal intervention. Citing *Rhem* v. *Malcolm,* 507 F.2d 333 (2d Cir. 1974) for the proposition that conditions of pretrial confinement are a proper subject of federal concern. The Court distinguished *Younger* v. *Harris,* 401 U.S. 37 (1971) and *Samuels* v. *Mackell,* 401 U.S. 66 (1971) on the ground that plaintiffs

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* Although not expressed in the Court's opinion, the use of *Johnson* as precedent is error as the decision was vacated as moot. *Regan* v. *Johnson,* —— U.S. ——, 43 U.S.L.W. 3294, November 18, 1974.

did not seek to enjoin a criminal prosecution (A. 420-21). The Court also stated that plaintiffs did not even seek to interfere with pending bail applications but merely sought an announcement of their rights (A. 421).*

In summary, the District Court concluded:

> "Although pre-trial confinement under the conditions existing in the Kings County Supreme Court creates substantial prejudice both to the effective defense of the detainee and to his ultimate fate if convicted, the requirement of monetary bail as a condition of release does not *per se* violate the equal protection clause of the Fourteenth Amendment. Provided the court has considered the individual factors concerning the risk of a defendant's failure to appear for trial and the inadequacy of other alternatives, the state's compelling interest in having the defendant present for trial justifies the use of monetary bail in a proper case. A defendant's inability to post the required bail may reflect not simply poverty, but lack of sufficient roots in the community to induce someone else to guarantee his presence. The due process clause, however, requires that a decision which may result in prolonged confinement shall be based on full evaluation of the facts, with an opportunity to present or controvert any pertinent evidence, and with a written statement of the reasons why a particular bail determination is reached." (A. 422)

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* Needless to say, since the District Court announced rights not presently part of Kings County, practice, the order indeed entails interference with pending, as well as, future applications.

POINT I

The relief ordered by the District Court violates traditional and well-established principles of comity, federalism, and equity, since the rules of practice mandated for the state courts interfere with the criminal process and since plaintiffs have adequate remedies at law.

A. The relief sought and granted herein violates the principles of comity and federalism.

Plaintiffs sought and obtained from the District Court declaratory and injunctive relief against judges who are handling pending criminal proceedings in the state courts. In effect, they obtained a wholesale reform of the New York bail system, since the District Court mandated extensive internal procedures for the state courts. This federal reform of a state bail system is an untoward interference with the operation of the state judicial system which violates well-established principles of comity and federalism.* See *O'Shea* v. *Littleton,* 414 U.S. 488 (1974); *Younger* v. *Harris,* 401 U.S. 37 (1971); *Samuels* v. *Mackell,* 401 U.S. 66 (1971). See also, *Kugler* v. *Helfant,* —— U.S. ——, 43 U.S.L.W. 4487 (April 28, 1975); *Huffman* v. *Pursue, Ltd.,* —— U.S. ——, 43 U.S.L.W. 4365 (March 18, 1975).

In *Younger,* the Supreme Court held that a federal court could not interfere with a pending state criminal prosecution except in the extraordinary circumstance in which a defendant is threatened by irreparable (i.e. "both great and

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* Issues similar to those raised in this point are before the District Court for the Southern District of New York in *Roballo* v. *Ross,* 74 Civ. 2113 (MEL, filed April 16, 1974) in defendants' motion to dismiss. In *Roballo,* a purported class of New York County pretrial detainees is challenging the bail practices employed in that county. The District Court has deferred determination of the motion pending the decision in the instant case.

immediate") injury to his federally protected rights which cannot be vindicated by his defense in the state proceeding. *Samuels* held the same principles applicable to defendants seeking declaratory relief—when an injunction would be improper, declaratory relief should ordinarily be denied.

"Our Federalism" represents a sensitivity to the legitimate concerns of state and national governments and teaches that the federal courts endeavor not to unduly interfere with the legitimate activities of a state, even though anxious to vindicate federally protected rights. *Younger* at 44. The doctrine of comity teaches that the federal courts will refrain from acting in order to avoid needless conflict with a state's administration of its own affairs, especially in the enforcement of its criminal laws. See, e.g. *Koehler* v. *Ogilvie,* 53 F.R.D. 98, 104-105 (N.D. Ill. 1971) (three-judge court), *aff'd.* 405 U.S. 906 (1972).

This Court's previous decisions reversing the two preliminary injunctions granted in this case reaffirm the principle of non-interference in the state criminal process. In its first opinion, while sympathetic to the goals the District Court sought to accomplish, this Court reversed an order mandating the acceptance of *pro se* motions by the Supreme Court Clerk, stating:

> ". . . we hold that under the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts." *Wallace* v. *Kern,* 481 F. 2d at 622.

In its second decision this Court squarely rejected the District Court's attempt to establish wholesale relief for inmates complaining of the lack of speedy trials:

> "This is not the proper business of the federal courts, which have no supervisory authority over the state courts and have no power to establish rules of practice for the state courts. Rather, the federal

> courts must limit their inquiry to the specific facts regarding a complaining petitioner. Relief from unconstitutional delays in criminal trials is not available in wholesale lots. Whether an individual has been denied his rights to a speedy trial must be determined ad hoc on a case-by-case basis." *Wallace* v. *Kern,* 499 F. 2d at 1356.

Such wholesale reform of state court procedures is exactly what the District Court ordered in this case. This Court's previous decisions compel the conclusion that the plaintiffs cannot use the vehicle of a § 1983 action to revise the bail procedures of the state courts, supplanting the role of the Legislature, the Appellate Division, administrative judges of the local courts, and others, regardless of the merit of the reform ordered. See *United States ex rel. Shakur* v. *Commissioner,* 303 F. Supp. 303, 309 (S.D.N.Y.), *aff'd.* 418 F. 2d 243 (2d Cir. 1969), *cert. den.* 397 U.S. 999 (1970). *Cf. Kail* v. *Rockefeller,* 275 F. Supp. 937 (E.D.N.Y. 1967); *New York State Association of Trial Lawyers* v. *Rockefeller,* 267 F. Supp. 148 (S.D.N.Y. 1967).

The Supreme Court recently dealt with precisely the type of federal interference ordered in this case. *O'Shea* v. *Littleton, supra.* In *O'Shea,* citizens of Cairo, Illinois challenged allegedly unconstitutional bail and sentencing practices of a county magistrate and judge. *Id.* at 491-92.* Like the instant plaintiffs, the *O'Shea* plaintiffs did not seek to enjoin an actual trial but sought federal intervention to revise bail and sentencing procedures. Although the Supreme Court found that the plaintiffs lacked standing, it went on at great length to squarely reject the type of federal interference which the Court of Appeals had suggested as a possibility. The Court of Appeals had suggested that the District Court could "set out the general

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* A third claim concerning the payment of fees for a jury trial was not discussed by the Court.

tone of rights to be protected and require only periodic reports of various aggregate data on actions on bail, sentencing, and dispositions of complaints." (*Sub nom. Littleton* v. *Berbling,* 468 F. 2d 389, 415 (8th Cir. 1972).

The Supreme Court reasoned that "an injunction against acts which might occur in the course of future criminal proceedings would necessarily impose continuing obligations" and that any member of the class could allege and have adjudicated a claim that the defendant were in contempt, with further federal review. Although the District Court herein did not mandate periodic reporting, the relief granted opens the federal court to any pretrial detainee who claims that the order has been violated. Thus, for example, a pretrial detainee may now bring a contempt proceeding challenging the state court bail determination, if he alleges that the People failed to recommend the type of securing order; that the People failed to meet their burden of proof in recommending monetary bail;* that the People failed to meet the burden of proving that alternative conditions of security would be insufficient to assure the accused's presence; that the accused did not receive an evidentiary hearing or that it did not occur within the time specified; or that a statement of reasons was not given, that it was not in writing, or that it was insufficient under the order.**

The District Court order obviously contemplates interruption of state proceedings to adjudicate these types of

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* The District Court did not specify which of the burden of proof standards was to be applied.

** Recognizing that *Younger* & *O'Shea* would bar relief which would entail disruption of normal state court proceedings via resort to the federal courts, plaintiffs urged below that they sought mere procedural reforms which would not require interruption of pending state proceedings or federal monitoring (Memorandum of Law in Support of Plaintiffs' Motion for Permanent Relief at 79-81). As the above examples well illustrate, the relief granted by the District Court entails precisely the type of disruption warned against.

claims of noncompliance. See *O'Shea* at 500. The *O'Shea* Court said of similar relief:

> "This seems to us nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger* v. *Harris, supra,* and related cases sought to prevent." *Id.* at 500.
>
> "Apart from the inherent difficulties in defining the proper standards against which such claims [of contempt] might be measured, and the significant problems of proving non-compliance in individual cases, such a major continuing intrusion of equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized in the decision previously noted." *Id.* at 502.

This District Court rejected the application of the *Younger* principles on several grounds. In the first instance, the Court found them inapposite because plaintiffs did not seek to enjoin an actual prosecution (A. 420; 369 F. Supp. at 186). The Court failed to recognize that the *Younger* doctrine applies with equal force to interference with the state criminal process, as well as an actual trial. Moreover, the District Court's narrow interpretation of *Younger* was specifically rejected by the *O'Shea* Court. The *O'Shea* plaintiffs posited a similar argument in the Court of Appeals, claiming that they only sought to enjoin unconstitutional bail practices, rather than an actual trial. 468 F. 2d at 408. The Supreme Court rejected this untenable distinction, stating:

> ". . . the Court of Appeals misconceived the underlying basis withholding federal equitable relief when the normal course of criminal proceedings in the state courts would otherwise be disrupted. The objection

> is to unwarranted anticipatory interference in the state criminal process by means of continuous or piecemeal interruptions of the state proceedings by litigation in the federal courts . . ." 414 U.S. at 500.

O'Shea is certainly not the only case which found the *Younger* principles applicable to the state criminal process rather than an actual trial. In *Inmates of Attica Correctional Facility* v. *Rockefeller,* 453 F. 2d 12 (2d Cir. 1971), this Court held that there was no precedent to support a federal order forcing the appointment of counsel for anyone who was to be interrogated by the State in connection with the Attica disturbance. Citing *Younger,* this Court said that such intervention, "in addition to its obvious potential for exacerbating federal-state relations, might constitute an unwarranted untrusion upon the pending state criminal proceeding'' 453 F. 2d at 22.

In *McLucas* v. *Palmer,* 309 F. Supp. 1353 (D. Conn.), *aff'd.* 427 F. 2d 239 (2d Cir.), *cert. den.* 399 U.S. 337 (1970), plaintiffs sought an injunction against a state court order which regulated demonstrations at the courthouse, required searches of those entering the courthouse, and barred participants from giving interviews or making extrajudicial statements. Noting that few principles are better established that federal noninterference with the administration of criminal justice by state courts, the Court "most emphatically" declined to interfere with the state court order, citing the same cases urged by defendants herein which stand for the principles of comity and federalism. 309 F. Supp. at 1358. See *Perez* v. *Ledesma,* 401 U.S. 82, 84 (1971); *Stepanelli* v. *Minard,* 342 U.S. 117, 123-24 (1951).

In *Harrington* v. *Arcencaux,* 367 F. Supp. 1268 (W.D. La. 1973), a plaintiff, who was a criminal defendant charged with murder, sought to enjoin state bail statutes, alleging that murder could no longer be treated as a capital offense and that he was entitled to bail under other state provisions governing bail in non-capital cases. The Court

found that the plaintiff had adequate remedies at law. Moreover, even though the plaintiff did not seek relief which would stay or delay his prosecution, the Court held that the *Younger* principles barred the intervention which he sought, stating:

> "Though Douglas v. City of Jeanette and Younger v. Harris, supra, direct attention to the policy against enjoining state proceedings, this Court is of the opinion that the principles of comity and federalism stated therein are controlling in this case, even though granting of the relief prayed for would not affect the state proceedings. The district court, in the absence of compelling circumstances, should not enjoin the legitimate activities of a state in the administration of its own criminal laws." 367 F. Supp. at 1272 (citations omitted).

See also *Cadena* v. *Perasso,* 498 F. 2d 383 (9th Cir. 1974) (*Younger & O'Shea* barred relief to plaintiffs who challenged the constitutional sufficiency of parole revocation proceedings); *Leslie* v. *Matzin,* 450 F. 2d 310, 312 (2d Cir. 1971), *cert. den.* 406 U.S. 932 (1972) (Court would not grant declaratory or injunctive relief to indigent state prisoners who sought to obtain free transcripts of their probable cause hearings); *Fowler* v. *Alexander,* 340 F. Supp. 168, 172-73 (M.D.N.C. 1972), *aff'd.* 478 F. 2d 694 (4th Cir. 1973) (Taxing costs of a criminal proceeding to the prosecuting witness is a "constituent part of the criminal procedure of North Carolina" and federal intervention is barred by *Younger* and its progeny).*

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* Since these cases make it clear that the *Younger* principles apply to the criminal process as well as in actual prosecution, the refusal of the District Court to apply those principles because plaintiffs did not challenge substantive criminal statutes under which they were indicted and because the threat to them could not be eliminated by their defense against a single prosecution (369 F. Supp. at 186) was clearly erroneous.

Moreover, this Court reaffirmed the principle of federal non-interference with state criminal process in its two earlier *Wallace* decisions, reversing District Court orders which did not enjoin actual trials (*ante* at 18-19). This Court reiterated that the federal courts have "no power to intervene in the internal procedures of the state courts" (481 F. 2d at 622), nor any "supervisory authority over the state courts." 499 F. 2d at 1351.

B. Plaintiffs do not fall within the exception delineated in *Younger*.

The District Court also stated (369 F. Supp. at 186) that even if the *Younger* principles were applicable to the instant situation, plaintiffs had presented facts which fall within the exceptional circumstances announced in *Younger*. To avoid the *Younger* proscription, plaintiffs must establish "the basic requisites of the issuance of equitable relief in these circumstances—the likelihood of substantial and immediate irreparable injury, and the inadequacies of remedies at law." *O'Shea*, 414 U.S. at 502; *Younger*, 401 U.S. at 46. In finding that the plaintiffs met this standard, the District Court erred.

In the first place, plaintiffs failed to show that they suffered "irreparable injury" which was "both great and immediate." *Younger* at 46. The Court in *Younger* specifically held that "certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single prosecution" are not by themselves irreparable in the "special legal sense of that term". *Id.* Pretrial detention is part of the cost and anxiety which some accused persons suffer in defending against a criminal prosecution. Defendants herein do not mean to minimize the burden that pretrial detainees may suffer because of overcrowding and delay, but this inconvenience simply does not meet the standard set forth by the Supreme Court. See *Schlesinger* v. *Councilman*, —— U.S. ——, 43 U.S.L.W. 4432, 4437 (March 25, 1975); *Gerstein* v. *Pugh*, —— U.S. ——, 43 U.S.L.W. 4230, 4236 (February 18, 1975).

Secondly, the plaintiffs in this case have failed to show that they are without adequate remedies at law, which precludes the granting of equitable relief. In addition to federal habeas corpus, a remedy at law (*post,* Point III), plaintiffs have numerous remedies in the state courts. By statute, at any time that an accused is in custody by virtue of a previously issued securing order he may make an application for bail or ROR (CPL § 510.20[1]) and he must be given an opportunity to be heard (§ 510.20[2]). A securing order issued by the Criminal Court will be reviewed by the Supreme Court upon application (§ 530.30). Bail is reviewed when the accused is rearraigned in the Supreme Court (§ 530.40). In addition, bail can be reviewed every time a Kings County defendant appears before the Court and may be reviewed in Part 10 upon application.

Plaintiffs contended that these were not adequate remedies because the procedures are constitutionally defective, and the District Court so held. Defendants maintain that this holding was incorrect (*post,* Point II). However, even if this Court affirms that holding, there are other adequate remedies available to plaintiffs. These other remedies were not challenged in this case, and their adequacy bars plaintiffs' attempt to come within the *Younger* exception. In the first place, a pretrial inmate may petition for a writ of habeas corpus in the Supreme Court. CPLR § 7002(5) (McKinney's Supp. 1974). There is no holding in this case that the constitutional infirmities alleged in this case infect habeas corpus proceedings. The denial of an application for habeas corpus relief may be appealed. CPLR § 7011. Secondly, a pretrial detainee may bring an original application in the Appellate Division rather than the Supreme Court. CPLR § 7002(5) (McKinney's Supp. 1974). Since this case in no way challenges Appellate Division remedies, it is apparent that plaintiffs have adequate remedies, even if this Court sustains the holding that the lower court practices are constitutionally defec-

tive. Finally, plaintiffs may proceed by the same route as the plaintiffs in *Bellamy* v. *Judges and Justices,* 41 A D 2d 196 (1st Dept.), *aff'd.* 32 N Y 2d 866, *remittitur* amd., 33 N Y 2d 632 (1973). (discussed *post,* Point III, B). The *Bellamy* plaintiffs raised constitutional challenges to New York County bail practices and insofar as they sought declaratory relief, their action was heard on the merits.

POINT II

The bail setting procedures in the Kings County Criminal and Supreme Courts do not violate plaintiffs' rights under the Eighth and Fourteenth Amendments. The new procedures mandated by District Court are not constitutionally required.

A. Introduction

The Court below, after finding that the Equal Protection Clause of the Fourteenth Amendment is not violated by the imposition of money bail as a condition of pretrial release, nevertheless surrounds that condition with specific procedural requirements that are not necessary when the other modes of pretrial security are involved.*

Despite the lack of any authority which would support its order, the District Court required, as a matter of due process, that an evidentiary hearing be held on the question of bail; that the prosecution must recommend the appropriate mode of security and when it recommends money bail, it has the burden of proving that money bail is necessary to secure the defendant's appearance and that

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* Under New York's Criminal Procedure Law, § 520.10[1], eight forms of bail are authorized in addition to ROR (*ante* at 20). Unlike the provisions of the federal statute (18 U.S.C. § 3146[a]), there is no requirement that the bailing court fix the least onerous condition of release, nor does the act create a presumption in favor of release on own recognizance. It is also readily apparent that despite clear authority to the contrary, the District Court has incorporated the provisions of the Bail Reform Act to non-federal detainees. See e.g. *Woodcock* v. *Donnelly*, 470 F. 2d 93 (1st Cir. 1972); *United States ex rel. Brown* v. *Fogel*, 395 F. 2d 291 (4th Cir. 1968); *Ballou* v. *Commonwealth*, 382 F. 2d 292 (1st Cir. 1967); *Gilmore* v. *California*, 364 F. 2d 916 (9th Cir. 1966), *cert. den.* 397 U.S. 1078 (1967). See 18 U.S.C. § 3152. In addition, the New York Court of Appeals has specifically declined to judicially adopt the federal Bail Reform Act, holding that such reform is within the province of the Legislature, not the Courts. *People ex rel. Gonzalez* v. *Warden*, 21 N Y 2d 18, 24, *cert. den.* 390 U.S. 903, 973 (1968).

other modes of pre-trial security will not be adequate; and that when the court imposes financial conditions, it must state reasons for so requiring, the statement of reasons to be in writing and to be given to the defendant.

B. Requirement for an evidentiary hearing

Despite the clear language contained in *United States ex rel. Shakur* v. *Commissioner,* 303 F. Supp. 303 (S.D.N.Y. 1969), *affd.* 418 F. 2d 243 (2d Cir. 1969), *cert. den.* 397 U.S. 999 (1970), and the uncontroverted fact that in both Criminal and Supreme Courts an evidentiary hearing would be (and in Special Term, Part 10 is) granted if requested by a pretrial detainee, the District Court has now mandated such a practice.

In *Shakur,* which this Court has called "a careful opinion," 418 F. 2d at 244, Judge Palmieri considered the necessity for an evidentiary hearing on the appropriateness of bail and held that such a hearing is best left to the discretion of the state court. In so holding the Court wrote (303 F. Supp. at 308):

> "Whether or not the New York County Supreme Court should have held an evidentiary hearing in order to obtain the *facts from the defendants* was entirely a matter for its discretionary decision. As an overburdened court it quite understandably requested that this matter be submitted to it by way of affidavits, probably because its trial facilities were preempted by other matters."* (Emphasis added)

In *Gerstein* v. *Pugh,* —— U.S. ——, 43 U.S.L.W. 4230 (February 18, 1975), the Supreme Court held that the

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* The *Shakur* Court also considered and specifically rejected arguments on the discriminatory impact of the money bail system against the poor and minorities, finding it sufficient to state that the system "is so thoroughly a part of our traditional procedures in criminal cases that nothing short of legislation can appropriately reform it". 303 F. Supp. at 309.

Fourth Amendment required a judicial determination of probable cause following arrest. Echoing a sentiment similar to *Shakur's,* while the Court recognized that "confrontation and cross-examination" might add to the reliability of such determinations "in some cases," in most cases, however, the value would be too slight to justify it as a matter of constitutional principle. The Court noted (43 U.S.L.W. at 4326 n. 23):

> "Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine of requiring adversary hearings for all persons *detained* pending trial could exacerbate the problem of pretrial delay."* (Emphasis added)

The cases relied upon by the District Court are inapposite. In *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), a parole revocation hearing was required in two stages: a preliminary (probable cause) hearing, warranting detention in jail, and a final hearing to determine if parole should be revoked. A similar requirement was mandated for revocation of probation after sentencing. *Gagnon* v. *Scarpelli,* 411 U.S. 778, 782 (1973). See *Mempa* v. *Rhay,* 389 U.S. 128

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* Assuming that there are 30 to 50 arraignments each trial day in each arraignment part and each hearing took ten minutes to 15 minutes, such a procedure would consume anywhere from five to 12½ hours per judge per day. Moreover it should be noted that the evidentiary hearing ordered in the instant case would take place no sooner than 72 hours after arraignment, at which time the preliminary hearing must also be held. It is the probable cause finding, not the bail determination that gives the Government the right to detain a defendant for trial. *Gerstein, supra,* 43 U.S.L.W. at 4273; *McNabb* v. *United States,* 318 U.S. 332 (1943); cf. *United States* v. *United States District Court,* 407 U.S. 297 (1972); *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971).

(1967); *Roberson* v. *Connecticut,* 501 F. 2d 305, 308-309 (2d Cir. 1975).

There is no question, however, that in each of those cases the outcome would absolutely determine whether an individual enjoying present "liberty" would serve his sentence behind or beyond prison walls.* See *Menechino* v. *Oswald,* 430 F. 2d 403, 410-412 (2d Cir. 1970). In *United States ex rel. Johnson* v. *New York State Board of Parole,* 500 F. 2d 925, 928 (2d Cir. 1974), vac. as moot *sub nom. Regan* v. *Johnson,* —— U.S. ——, 43 U.S.L.W. 3294 (November 19, 1974), this Court wrote:

> "This conclusion does not overrule *Menechino* which held that an inmate being considered for parole was not entitled to the full panoply of due process rights, including a specification of charges, counsel and cross-examination, in a non-adversarial determination."

See also *Drown* v. *Portsmouth School District,* 435 F. 2d 1182 (1st Cir.), *cert. den.* 402 U.S. 972 (1970).

As in *Menechino, Johnson,* and *Gerstein,* there are no evidentiary "facts" such as violation of parole or the commission of a new crime to be adjudicated, since bail and its amount or form are based on probabilities. Paraphrasing from *Stack* v. *Boyle,* 342 U.S. 1, 5 (1952), the question is what amount or guarantee, "subject to forfeiture", serves as assurance that the accused will stand trial and submit

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* In the parole or probation revocation situation, an adverse determination will result in the immediate loss of liberty and the decision of the state board may be unreviewable. Bail applications can be made to the determining, as well as reviewing, courts. See *ante* at 21. The possibility of loss of testimony and evidence is simply not a problem in bail determinations. Moreover, as the Court noted in *Gerstein, supra,* 43 U.S.L.W. at 4236 n. 22, the requirement of a preliminary adversary hearings required in *Morrissey* and *Gagnon* served the dual purpose of "gathering *and* preserving live testimony since the final revocation hearing is held at some distance from the place where the violation occurred", a problem not here present.

to punishment. *Ex Parte Milburn,* 9 Pet. 704 (1835). See *United States ex rel. Shakur* v. *Commissioner, supra,* 303 F. Supp. at 308. *People ex rel. Gonzales* v. *Warden, supra,* 21 N Y 2d at 24-25.* This is simply not a "fact" determination analogous to parole violation.

The analogy to *Duncan* v. *Louisiana,* 391 U.S. 145 (1968), and *Argersinger* v. *Hamlin,* 407 U.S. 25 (1975), is similarly of no moment as they turn on consideration of Sixth Amendment rights not applicable to bail determinations. See, e.g., *Kirby* v. *Illinois,* 406 U.S. 682 (1972); *United States ex rel. Robinson* v. *Zelker,* 468 F. 2d 159 (2d Cir.), *cert. den.* 411 U.S. 939 (1973). Bail determination proceedings are *sui generis* and not governed by any mode of process used to determine adjudicative facts.

Most importantly, insofar as the District Court has now mandated evidentiary hearings, it suffers from the additional error of superfluousness. The court credited the judges' testimony to the effect that no one had ever asked for or demanded an evidentiary hearing, and had such a demand been made it would have been granted.

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* For similar reasons *Goss* v. *Lopez,* —— U.S. ——, 43 U.S.L.W. 4181 (January 22, 1975), is inapplicable. The process afforded a student in cases of a suspension is not a full-dress adversary proceeding but an informal session where the student is informed of the charges against him and the underlying basis for those charges, and given an opportunity to offer an explanation. As at least that process is given a defendant in the bail hearings, *Goss* is, in any event, complied with. 43 U.S.L.W. at 4186.

Moreover, the requirement of a hearing would place at risk a defendant's right not to be compelled to testify. Cf. *State* v. *Gallagher*, 38 Ohio St. 2d 291 (1974), 313 N.E. 2d 366, *cert. granted sub nom. Ohio* v. *Gallagher*, —— U.S. ——, 43 U.S.L.W. 3524 (March 31, 1975). Judges Booth, Damiani, and Barshay testified that their concern for a defendant's Fifth Amendment rights led them to the conclusion that they preferred that a defendant speak through counsel. If an evidentiary hearing was required, the prosecution could inquire on cross-examination into all aspects governing amount and form of bail, including likelihood of conviction on the charges. Hardly a result, it is submitted, that could be countenanced. Lastly, the state courts provide ample opportunity for defendants to bring new or verified information to the courts' attention (*ante* at 12, 21).

Thus, there has been no showing that, if requested, an evidentiary hearing would be denied; that there is any legal support for such a requirement; or that it is sound in policy. Kings County procedures are legally sufficient and in any event, the evidentiary hearing ordered by the District Court is not constitutionally required.

C. Requirement that the prosecutor sustain the burden of proof, when financial bond is demanded

Apparently, proceeding from the erroneous premise that financial security is somehow constitutionally suspect, the District Court surrounds the requirement of financial security with special procedural requirements not otherwise mandated. The Court requires that the prosecutor sustain the burden of proving not only that financial conditions of security are necessary to assure defendant's appearance at trial, but also that non-financial conditions of security will not adequately insure the defendant's appearance and submission to sentence if found guilty.*

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* The District Court failed to specify which of the burdens of proof applied.

In so doing, the Court has fundamentally misconceived the nature of bail and the constitutional policy underlying the imposition of financial bail requirements, requirements that have time and again been sustained. Moreover, the court below has placed an unreasonable burden on the prosecution, to in effect, prove a negative. See 9 Wigmore, *Evidence* (3d Ed. 1940) § 2486.*

Bail, as stated in *Stack* v. *Boyle, supra,* 342 U.S. at 5:

> "Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of the accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."

Thus, notwithstanding Mr. Justice Douglas' concern in *Bandy* v. *United States,* 81 S. Ct. 197 (1960), money bail is not constitutionally suspect and therefore need not be surrounded by special protections, and certainly not a "least drastic means" test imposed by the Court.

Bail is conditioned not on the state's giving adequate assurance that it would guarantee the accused's presence, but on the *accused's* giving adequate assurance that he would be present. There is, furthermore, no right, except as defined by statute, to a particular form of bail. The only

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* Wigmore identified three criteria usually used in apportioning the burden of both going forward and persuasion. In sum, these are: party having in form the affirmative allegation, the party to whose case the fact is essential or the party who presumably has the peculiar means of knowledge. The first two of these represent developed statutory or common law forms, the third represents a common-sense approach. Under any of these tests, the burden should rest on the defendant, in the absence of a statute to the contrary. See *United States ex rel. Kane* v. *Bensinger,* 359 F. Supp. 181, 183 n. 2 (N.D. Ill., 1972), *aff'd. sub nom. United States ex rel. Walker* v. *Twomey,* 484 F. 2d 874 (7th Cir. 1973).

requirement is that the setting of bail be "individualized" with regard to the "traditionally relevant circumstances". Within those limits, bail is addressed to the sound discretion of the Court.* *United States ex rel. Goodman* v. *Kehl,* 456 F. 2d 863, 868 (2d Cir. 1972); *Mastrian* v. *Hedman,* 326 F. 2d 708 (8th Cir.), *cert. den.* 376 U.S. 965 (1964); *United States ex rel. Covington* v. *Coparo,* 297 F. Supp. 203, 206-207 (S.D.N.Y. 1968); *People ex rel. Gonzalez* v. *Warden, supra,* 21 N Y 2d at 23; *People ex rel. Lobell* v. *McDonnell,* 296 N Y 109, 111 (1947).

While federal policy favors, as a matter of statute, the least onerous condition of release, such a policy does not express or purport to express a theory of constitutional law. 18 U.S.C. § 3146(a); *United States* v. *Bobrow,* 468 F. 2d 124, 126 (D.C. Cir. 1972); *United States* v. *Leathers,* 412 F. 2d 169, 170-171 (D.C. Cir. 1969). See *ante* at 38 n.* Consequently, a federal preference for non-financial conditions of release does not in the absence of a statute so mandating, create a state preference.** See *ante* at 38 n.*. See, e.g., *State ex rel. Loper* v. *Stack,* 291 So. 2d 207 (Fla. App. 1974); *Caudill* v. *State,* 311 N.E. 2d 429 (Ind. 1974).

In other contexts when an adversary hearing is required and when the question of liberty is involved, the State

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* The traditionally relevant circumstances are, as stated in *Lobell, supra,* and *Gonzalez, supra,* are: nature of the offense, the penalty to be imposed, the probability of the willing appearance or flight, the pecuniary and social character of the defendant and his general reputation and character, and the apparent nature and strength of the proof as bearing on the probability of his conviction.

** While there is no formal non-financial preference, as a practical matter substantially more than half of the criminal defendants (55-60%) are RORed at the Criminal Court level, with additional detainees released in Supreme Court (A. 176). Robert Patterson testified that he thought that the Commission would not have reached the same conclusions concerning money bail if they knew that 40% of the defendants in Kings County Criminal Court were RORed (T.B. 568).

similarly does not have to sustain a burden of proof anything like the one imposed upon it in the case at bar. This Court, in *Roberson, supra* 501 F. 2d at 308-309, wrote:

> "Appellant concedes that a probationer found to have committed a felony on the basis of independent evidence introduced at a relatively informal hearing at which the State does not have the burden of proof beyond a reasonable doubt, can be incarcerated immediately."

Thus, requiring the prosecutor to make a recommendation and sustain a double burden of proof is artificial and merely serves to excuse defense counsel's absence of preparation. It moreover would undoubtedly serve more to obfuscate issues than to clarify them, and give the judge, to whose discretion the question of bail is addressed, less, rather than more, information upon which to make the appropriate decisions on the question of whether a defendant will "skip" or not.* *United States ex rel. Shakur, supra.***

Moreover, the State does undertake, through the State-funded PTSA, to find all the information pertinent to the accused's roots, pecuniary and social status, and attempts to verify the information which forms the basis for the ROR report, wholly independent of counsel's efforts. The defendant, at all times, may supplement this information,

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* Cf. *Lego* v. *Twomey*, 404 U.S. 477 (1972).

** The mere fact that a defendant cannot make bail does not create any presumption regarding its excessiveness or its reasonableness. While a defendant's pecuniary condition is a factor to be considered in conjunction with his "social" condition, it is neither the sole, nor the most significant factor. In a line of cases beginning with *White* v. *United States*, 330 F. 2d 811, 814 (8th Cir.), *cert. den.* 385 U.S. 1029 (1967) and subsequently adopted by the Ninth Circuit, *White* v. *Wilson*, 399 F. 2d 596 (1968), the courts have held that no charge of excessive bail can be founded solely on the inability of the defendant to post the requisite bond. Cf. *Shilb* v. *Kuebel*, 404 U.S. 357, 369 (1971).

produce those who will verify, and supply missing information. Finally, the accused, not the State, is in the best position to supply data, either personally or through his counsel, on his personal circumstances, his ties, and omissions in his prior record, which his counsel can independently verify and present to the Court as soon as it is available. In this light, little or no purpose would be served by requiring the prosecutor to sustain the heavy burden placed upon him by the District Court. It would indeed be a strange theory of law to mandate that the State provide indigents with counsel and investigative services free of charge and yet require the prosecution to bear a substantially onerous burden. Yet that is what the District Court holds is constitutionally required.

D. Requirement for a written statement of reasons

The District Court, analogizing to *Morrissey* v. *Brewer, supra,* and *Wolff* v. *McDonnell,* 418 U.S. 539, 564-565 (1974), mandates that the bail setting judge furnish the defendant with a statement of reasons for the decision reached.* In *Wolff, supra,* the Court required a written "record" to assure that "administrators will act fairly" and to protect the inmate "from collateral consequences based on a misunderstanding of the nature of the original proceeding" 418 U.S. at 565. In addition, without written records "the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others." *Id.* In *Johnson, supra,* the Court imposed a reasons requirement so that the inmate would be able to be aware of and work to cure defects leading to parole denial, and to prevent arbitrariness. Defendants concede that these goals are in and of themselves, laudable;

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* *People* v. *Vasquez,* 76 Misc. 2d 5 (Crim. Ct. Bronx Co. 1973), cited by the District Court (A. 404), concerns itself with the practice that the complainant need not appear at arraignment, a practice not used in Kings County.

however the prophylactic effect and minimal benefit* to the detainee does not mandate such a result. First, the setting of bail in a particular form or amount has no collateral consequences from which the defendant needs to be shielded; and secondly, bail review, even in this Court, by way of federal habeas corpus, is not inhibited. While weight may be given the original Criminal Court determination in subsequent reviews, each bail review on either the Criminal or Supreme Court level is essentially *de novo*. Moreover, as the defendant and counsel are present before the Court, they are able to apprise any subsequent court of the factors before it. Judge Barshay, indeed, requires such a practice (A. 341-342, 345-347).

On appeal, the record is before the appellate court and as the standard of review is the abuse of discretion, if there is any support in the record for the decision, the presumption of regularity requires the decision be sustained, though the Appellate Division has independent discretion to alter bail conditions. See e.g. *People ex rel. Barnes* v. *Warden*, —— A D 2d ——, 365 NYS 2d 17, 18 (1st Dept. 1975).** This presumption would attach whether or not the lower court articulated its reasons. See also *People ex rel. Parone* v. *Phimister*, 29 N Y 2d 580, 581 (1971).

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* Judge Damiani testified that the absence of written reasons does not prejudice a detainee in the course of bail review (A. 176).

** *United States ex rel. Covington* v. *Coparo, supra; Simon* v. *Woodson*, 454 F. 2d 161, 165 (5th Cir. 1972); *United States ex rel. England* v. *Anderson*, 347 F. Supp. 115 (D. Del. 1972). Indeed, before a Court by way of habeas corpus relief can set aside a bail determination as being violative of the Eighth Amendment, a two stage inquiry is required: (1) Is the amount set more than is reasonably necessary, in light of the traditionally relevant circumstances, to assure the presence of the accused; and if so, (2) since excessive bail is tantamount to a denial of bail, is there reason to believe the defendant will not appear. *United States ex rel. Goodman* v. *Kehl, supra*, 456 F. 2d 868-869; *Mastrian* v. *Hedman, supra; Dameron* v. *Harson*, 364 F. 2d 991 (5th Cir. 1966).

On federal habeas review, a reasons requirement has not with one now overruled exception, been mandated as a matter of due process. In *United States ex rel. Shakur, supra,* the District Court had no trouble, despite the absence of a statement of reasons, in approving the state court determination. While in *United States ex rel. Keating* v. *Bensinger,* 322 F. Supp. 784 (N.D. Ill. 1971), relied on by the court below, it was held that a statement of reasons was necessary to determine whether the bail set or denied was arbitrary, in a subsequent line of cases, the reasoning of that decision has been overruled.

In *Keating, supra,* 322 F. Supp. at 787, the Court held that the state court's failure to provide "any basis" for the decision denying bail "creates a presumption of arbitrariness".* In *United States ex rel. Kane* v. *Bensinger, supra,* the same District Court considered and specifically rejected the "reasons" requirement of *Keating.* The Court wrote (359 F. Supp. at 183):

> "But while we assume that the *entire* Eighth Amendment applies to the states through the Fourteenth Amendment, I cannot concur with Judge Will's conclusion that a mere failure to provide supporting reasons

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* But see in this regard *LaVallee* v. *Delle Rose,* 410 U.S. 690 (1973), *rev'g. United States ex rel. Delle Rose* v. *LaVallee,* 468 F. 2d 1288 (2d Cir. 1973). There, over the specific dissent of four justices who argued for affirmance on the ground that the state court failed to offer any reasoned explanation for its action, the Court held that a clear statement of reasons was not required for purposes of 28 U.S.C. § 2254(d)(1). Quoting from *Townsend* v. *Sain,* 372 U.S. 293, 314-315 (1963), the Court wrote (410 U.S. at 694):

> "Furthermore, the coequal responsibilities of state and federal judges in the administration of constitutional law are such that we think the district judge may, in the ordinary case where there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was applied."

> for the denial of bail, particularly in the post-conviction setting, of itself constitutes arbitrary action or creates a 'presumption of arbitrariness'. . . . Indeed it has generally been assumed that court judgments carry a 'presumption of regularity' when attacked collaterally through the habeas corpus remedy."

The Seventh Circuit affirmed *Kane,* stating (484 F. 2d at 876):

> "The fact that articulation by a state court of its reasons for denial release on bail would usually make it easier for a federal court, considering a petition for habeas corpus, to decide whether the denial could be said to have a rational basis, does not authorize federal courts to impose that procedural requirement on the state courts."

This reasoning has been recently reaffirmed in *United States ex rel. Smith* v. *Twomey,* 486 F. 2d 736, 739 (7th Cir. 1973), *cert. den.* 416 U.S. 994 (1974).*

It is therefore urged that in requiring statement of reasons, the Court below has gone far beyond what is constitutionally required. Moreover, by requiring a hearing and a statement of reasons, the Court's order will rather further exacerbate the underlying problem—pretrial delay. Efforts have been made by state officials toward the goal of minimizing the delay attendant upon pretrial proceed-

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* While the language in *DeChamplain* v. *Lovelace,* 510 F. 2d 419, 427 (8th Cir. 1975), cert. filed 43 U.S.L.W. 3572 (April 10, 1975), would appear to be contrary, that case is distinguishable. Most important was the fact that the choice there was not between release or release on presumptively adequate security, as in the instant case, but between release and confinement. Secondly, while the Court there was considering release of a federal military prisoner, imprisoned by administrative action and therefore subject to the federal court's supervisory power, the instant case involved a co-equal state court not subject to general federal supervision. See *Wallace,* I, *supra.*

ings while still affording adequate opportunities to protect defendants' rights. The order will, as it must, unduly burden the state court in fulfilling its statutory mandate to fix requirements, whether financial or otherwise, that will "reasonably assure a defendant's presence" and further exacerbate pretrial delay.

In *Gerstein* v. *Pugh,* 43 U.S.L.W. at 4236-4237, the Supreme Court held that when a person is detained (as opposed to being released on his own recognizance),* the decision to detain (probable cause finding) must be made by a disinterested magistrate. The Court declined to specify the procedure to be used in making the determination, emphasizing the desirability of "flexibility and experimentation by the States". The decision and order below foreclosed such experimentation and flexibility by a Legislature or state court, most familiar with state problems and best able to establish the appropriate mode of dealing with them. See also, *Schlesinger* v. *Councilman,* —— U.S. ——, 43 U.S.L.W. 4432, 4437-4438 (March 25, 1975).

Thus, the principal error extant in the District Court's order is that, despite the clear caveat in *Gerstein,* it established a new Criminal Procedure Law, complete with notice requirements, burdens of proof and persuasion, preferences in both form and substance, all under the umbrella of due process of law. Due process requires only that a person detained of his liberty be afforded an opportunity to be heard, at a meaningful time and in a meaningful manner. It does not authorize a federal court to legislate a code of criminal procedure.

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* 43 U.S.L.W. 4232 n. 11, and 4237 n. 26.

POINT III

An attack upon incarceration which allegedly results from unconstitutional bail practices must be brought under the federal habeas corpus statute.

A. Plaintiffs herein attack the fact of their custody and cannot avoid the rule of *Preiser* by the label on their action or the manner in which they frame their demand for relief.

Plaintiffs in this case describe themselves as pretrial detainees whose incarceration allegedly results from unconstitutional bail practices in the Kings County Courts (2d Amd. Compl. ¶¶ 2, 15-16). It is manifest that plaintiffs seek, in essence, release from custody since they raised a direct challenge to the fact of their incarceration and sought and received corrective bail procedures intended to result in the release of more accused persons (see *post* at 54-55). Accordingly, plaintiffs can obtain federal relief only in a habeas corpus proceeding, after exhausting their state remedies. *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).

Plaintiffs cannot avoid the exhaustion requirement merely by labeling their cause of action a civil rights complaint and demanding corrective procedures for possible release on bail or ROR, rather than immediate release. It is not the demand for relief which determines whether or not habeas corpus is the proper remedy but whether or not the challenge is to the lawfulness of restraint.*

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* This issue is also before the District Court in *Roballo* v. *Ross*, *ante* at 17 n.**

In *France* v. *People of the State of New York*, 74 Civ. 2191 (S.D.N.Y., LFM) a purported class of New York County pretrial detainees sought relief under 42 U.S.C. § 1983, alleging, *inter alia*, that the practices employed by the District Attorney and State and City Judges resulted in the routine setting of excessive bail. Defendants' motion to dismiss was granted on July 25, 1974. The District Court held that "in effect, plaintiffs seek relief from incarceration pending trial" and that such relief is available only in habeas corpus.

Preiser at 486; *United States ex rel. Dereczynski* v. *Longo,* 368 F. Supp. 682, 685 (N.D. Ill., 1973); *Baskins* v. *Moore,* 362 F. Supp. 187 (D.S.C. 1973). The courts "have been quick to dismiss attempts to disguise habeas corpus petitions as civil rights actions." *Grayson* v. *Montgomery,* 421 F. 2d 1306, 1308 (1st Cir. 1970). See also, e.g., *Still* v. *Nichols,* 412 F. 2d 778, 779 (1st Cir. 1969); *Pryor* v. *Regan,* 370 F. Supp. 150 (S.D.N.Y. 1974); *United States ex rel. Spain* v. *Oswald,* 342 F. Supp. 97, 99 (E.D.N.Y. 1972).

Thus, for example, in *United States ex rel. Dereczynski* v. *Longo, supra,* four parolees challenged the parole revocation procedures under which they were incarcerated. Like the instant plaintiffs, the parolees sought to avoid the rule of *Preiser* on the ground that they did not seek immediate release but rather corrective procedures to determine if they were entitled to release. The Court rejected this attempted distinction and held that the action could be maintained only under the federal habeas corpus statute. *Id.* at 685. *Accord, Mason* v. *Askew,* 484 F. 2d 642, 643 (5th Cir. 1973). This factual situation was noted by the *Preiser* Court as one in which the grievance is unlawful restraint. *Preiser,* 411 U.S. at 486, citing *Morrissey* v. *Brewer,* 408 U.S. 471 (1972).

Similarly, in *Baskins* v. *Moore, supra,* inmates who were denied parole release challenged the constitutionality of the Parole Board's procedures. They too sought to avoid *Preiser,* claiming that they did not seek immediate release but only a renewed "prospect" of release. 362 F. Supp. at 190. Noting that this was an "overly restrictive" interpretation of *Preiser* which would violate the principle articulated therein (*id.* at 189, 191), the Court held that habeas corpus was the proper remedy and that the claim must first be exhausted in the state courts. *Id.* at 191. Despite the labels attached to the demand for relief, the Court stated that goal of the corrective procedures was "of course" release, regardless of the denomination of the relief. *Id.*

at 190-91.* Although plaintiffs herein attack bail, not parole procedures, the reasoning of these cases is clearly applicable to them since their goal is obviously the renewed or increased prospect of release.

It is well established that habeas corpus relief is not limited to immediate release from incarceration, nor need such a demand be made to invoke habeas corpus relief. E.g. *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973); *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); *Peyton* v. *Rowe*, 391 U.S. 54 (1968). Title 28 U.S.C. § 2243 specifically authorizes the court to "summarily hear and determine the facts, and *dispose of the matter as law and justice require*" (emphasis supplied). The courts are thus empowered to fashion appropriate remedies other than immediate release. *Peyton* v. *Rowe, supra* at 66. See *Grayson* v. *Montgomery, supra* at 1308; *United States ex rel. Daniels* v. *Johnson*, 328 F. Supp. 100, 118 (S.D.N.Y. 1971). A classic situation in which an individual habeas corpus petition resulted in the establishment of corrective procedures akin to those sought herein is *Morrissey* v. *Brewer, supra*, which mandated the due process rights to be accorded in parole revocation proceedings. See also *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

It is clear that the relief requested and that ordered by the District Court (requiring, *inter alia*, evidentiary hearings; the imposition of monetary bail only when it is proved that an alternative form is not appropriate; and a written statement of reasons) is intended to and will result in the

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* But see *United States ex rel. Johnson* v. *Chairman of New York State Board of Parole*, 500 F. 2d 925, 926 (2d Cir. 1974), vac. as moot, —— U.S. ——, 43 U.S.L.W. 3294 (Nov. 18, 1974). The Court therein, while noting that the parole decision represents the difference between incarceration and conditional liberty (500 F. 2d at 929), did not explain why a challenge to parole release procedures differs from a challenge to parole revocation procedures, the latter having been defined by the Supreme Court as a challenge to unlawful restraint, properly brought by habeas corpus. *Preiser*, 411 U.S. at 486.

release of many pretrial detainees. Indeed, the witnesses testified, for example, that a system of conditional or supervised release is intended to result in the release of more defendants than the present system (T.B. 555); that more defendants could be released if the courts had more information (A. 99-100, 169, 202); that verification of the information provided (effected by the District Court by way of evidentiary hearings) would result in the release of more defendants (A. 208, T.B. 186, T.E. 61-62); and that a statement of reason would be helpful in seeking bail reductions (T.B. 157, 454).

Preiser's holding that a challenge to the fact or duration of custody can only be maintained in habeas corpus emphasizes the traditional concept of federal-state comity (411 U.S. at 490-92) and underscores with the rule that equitable relief may not be sought when there exists an adequate remedy at law.* Habeas corpus has been consistently recognized as the correct avenue of federal relief when state prisoners attack their pretrial detention, challenging the excessiveness or denial of bail. E.g. *In re Shuttleworth,* 369 U.S. 35 (1962); *United States ex rel. Goodman* v. *Kehl,* 456 F. 2d 863, 868 (2d Cir. 1972); *Mastrian* v. *Hedman,* 326 F. 2d 708 (8th Cir.), *cert. den.* 376 U.S. 965 (1964); *United States ex rel. McCrawford* v. *Singerman,* 369 F. Supp. 641, 642 (S.D.N.Y. 1973); *United States ex rel. Shakur* v. *Commissioner,* 303 F. Supp. 303, 306 (S.D.N.Y.), *aff'd.* 418 F. 2d 243 (2d Cir. 1969), *cert. den.* 397 U.S. 999 (1970).

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* This Court has held that 42 U.S.C. § 1983 was never intended to abrogate the well-established principle that a suit seeking equitable relief will not be entertained when there is a plain, adequate, and complete remedy at law. *Potwora* v. *Dillon,* 386 F. 2d 74, 77 (2d Cir. 1967). See also *Appalachian Volunteers, Inc.* v. *Clark,* 432 F. 2d 530, 537 (6th Cir. 1970), *cert. den.,* 401 U.S. 439 (1971); *Wright* v. *McMann,* 387 F. 2d 519, 523 (2d Cir. 1967); *Egner* v. *Texas City Independent School District,* 338 F. Supp. 931, 933-36 (S.D. Texas 1972). Cf. *O'Shea* v. *Littleton, supra,* at 502. Plaintiffs herein have adequate remedies at law in the state courts (*ante* at 19-21) as well as through federal habeas corpus.

Habeas corpus is also the proper remedy when an inmate challenges the practices and procedures used in determining bail. *United States ex rel. Smith* v. *Twomey,* 486 F. 2d 736, 739 (7th Cir. 1973), *cert. den.* 416 U.S. 994 (1974); *United States ex rel. Walker* v. *Twomey,* 484 F. 2d 874, 876 (7th Cir. 1973), *affg. United States ex rel. Kane* v. *Bensinger,* 359 F. Supp. 181, 183-84 (N.D. Ill. 1972) (challenging the failure of the state courts to give a statement of the reasons for the determination); *United States ex rel. Shakur* v. *Commissioner,* 303 F. Supp. at 308 (challenging the failure of the state court to hold an evidentiary hearing on bail). In *Aldarondo* v. *Supreme Court of Puerto Rico,* 369 F. Supp. 1173 (D.P.R. 1974), an inmate who was denied bail pending appeal attacked that determination because there was no statement of reasons and apparently because there was no hearing. *Id.* at 1175. The Court refused to treat his pleadings as a § 1983 action, holding that under *Preiser* he was attacking the fact of his confinement and must proceed by way of federal habeas corpus, after he had exhausted his state remedy. *Id.* at 1176.*

Exhaustion of available state remedies is of course required in all of these situations. E.g. *United States ex rel. Goodman* v. *Kehl, supra* at 869; *Aldarono* v. *Supreme Court of Puerto Rico, supra; Jones* v. *Tubman,* 360 F. Supp. 1298 (S.D.N.Y. 1973); *Revty* v. *Commonwealth of Pennsylvania,* 358 F. Supp. 258 (W.D. Pa. 1973). The state remedies available to plaintiffs have been previously described (*ante* at 21).

Finally, the District Court in this case suggested that the decision announced in *Wilwording* v. *Swenson,* 404 U.S. 249 (1971), *reversing* 439 F. 2d 1131 (8th Cir.), would allow this action to be treated as a civil rights complaint, not

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* In *O'Shea* v. *Littleton, supra,* at 496, the Court emphasized that if the plaintiffs who attacked, *inter alia,* unconstitutional bail practices were *actually* incarcerated, a civil rights complaint would be an inappropriate remedy, citing *Preiser.*

subject to exhaustion, even if it were cognizable in habeas corpus. *Wilwording* is clearly inapposite. The inmates in that case challenged the physical conditions of their confinement, for example, restrictive confinement and treatment by prison personnel. 439 F. 2d at 1332. They did not attack the legality of the practices which resulted in their incarceration (*id.*), as do the plaintiffs at bar.

B. Exhaustion is not futile and plaintiffs have available state remedies.

Assuming *arguendo* that this action could be maintained only as a habeas corpus proceeding, plaintiffs claimed in the court below that state remedies were ineffective. As defendants have already shown, there are numerous available avenues of relief open to plaintiffs (*ante* at). Plaintiffs also complained that the state courts did not provide them with class remedies. Needless to say, a state court determination that certain procedures are mandated or prohibited need not be decided in a class action to apply to all similarly situated persons. *E.g., People ex rel. Menechino* v. *Warden,* 27 N.Y. 2d 376 (19) (parolees are constitutionally entitled to counsel and to introduce testimony at parole revocation proceedings). See *Rivera* v. *Trimaro,* —— N.Y. —— (March 19, 1975) (granting of class action relief in Article 78 proceeding challenging governmental operations is an abuse of discretion since relief to one petitioner would flow to others similarly situated under principles of *stare decisis*).*

Plaintiffs also claimed that exhaustion was futile because of the decision in *Bellamy* v. *Judges & Justices,* 41 A D 2d 196 (1st Dept.), *affd.* 32 N.Y. 2d 886, *remittitur amd.* 33 N Y 2d 632 (1973). In *Bellamy,* a group of New York County pretrial detainees raised challenges similar

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* The same principle applies in the federal courts, E.g., *Vulcan Society* v. *Civil Service Commission,* 360 F. Supp. 1265, 1266-67 n. 1 (S.D.N.Y.), *affd. in relevant part,* 490 F. 2d 387 (2d Cir. 1973).

to those raised herein. However, since the plaintiffs at bar present the federal courts with an action predicated on new and different facts from those presented in *Bellamy*, it is manifest that they present a different case from *Bellamy*. Accordingly, resort to the state courts is not futuile and they must be given the first opportunity to consider the instant claims. *Picard* v. *Connor*, 404 U.S. 279 (1971); *United States ex rel. Gibbs* v. *Zelker*, 496 F.2d 991, 994 (2d Cir. 1974); *United States ex rel. Nelson* v. *Zelker*, 465 F.2d 1121, 1124 (2d Cir. 1972).

The doctrine of futility excused a habeas corpus applicant from exhaustion requirement *only* when it is clear that the state court has considered an identical claim and it is manifest that the same result would be reached were the claim re-presented. The prerequisities to the invocation of the doctrine were recently discussed by this Court in *United States ex rel. Sero* v. *Preiser*, 506 F. 2d 1115 (1974), *cert. den.* —— U.S. ——, 43 U.S.L.W. 3547 (April 14, 1975). In *Sero* three members of a class of habeas corpus petitioners has fully complied with the exhaustion requirement by raising the same claim in the state courts. The Court therefore held that it would be futile for the rest of the class to raise the identical issue. The Court said:

> "This 'futility' doctrine, of course, comports with the policies underlying the demand for exhaustion in the ordinary case. *We must be sure that the state court has had the opportunity recently to consider the identical claim. Moreover, its decision of the issue must be so clear that any further consideration given similar cases by the state court is likely to be summary,* so that a federal court entertaining such a case is not likely to disrupt state judicial administration." *Id.* at 1130. (emphasis supplied).

See also, e.g., Layton v. *Carson*, 479 F. 2d 1275 (5th Cir. 1973); *United States ex rel. Hughes* v. *McMann*, 405 F. 2d

773, 775 (2d Cir. 1968); *Gesicki* v. *Oswald*, 336 F Supp. 365 (S.D.N.Y. 1971).

That a claim based on different facts is not an "identical" or "same" claim is illustrated by numerous cases discussing the exhaustion principle. The requirement that a federal habeas corpus applicant first present the same claim to the state courts (e.g. *Picard* v. *Connor*, 404 U.S. 270 [1972]) requires that the claim be based on the same evidence in the state courts as alleged in the federal court. A petitioner fails to present such a claim when he alleges to the federal court different or stronger evidence than was ever presented to the state courts. E.g. *United States ex rel. Cleveland* v. *Casscles*, 479 F. 2d 15, 19-20 (2d Cir. 1973); *United States ex rel. Figueroa* v. *McMann*, 411 F. 2d 915 (2d Cir. 1969); *United States ex rel. Boodie* v. *Herold*, 349 F. 2d 372 (2d Cir. 1965); *United States ex rel. Kessler* v. *Fay*, 232 F. Supp. 139, 142 (S.D.N.Y. 1964).

Using the standard that the identical claim must have been presented to the state courts before the futility doctrine can be invoked, it is manifest that this case is not identical to the case presented to the *Bellamy* courts since it is based on new and different evidence. The *Bellamy* case was predicated on a statistical study of New York County detainees who raised constitutional challenges to bail practices in that county, similar to those raised herein. No other significant evidence was produced in that case and no trial was held.* The *Bellamy* action was, in the words of the *Bellamy* plaintiffs themselves, "in substantial part predicated on the results of a detailed statistical study" (Plaintiffs' Appellate Division Memorandum at 2), described as "the heart of the lawsuit" (Plaintiffs' Court of Appeals Brief at 2).**

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* Bellamy was commenced in the Appellate Division as an original application for prohibition or mandamus and a declaratory judgment.

** The *Bellamy* file is available to this Court upon request.

It is obvious that the instant case differs from *Bellamy*. Plaintiffs herein rely on the *Bellamy* study in small part only (T.A. 368-90).* The study was prepared by Eric Single, who testified that he was not familiar with ROR sheets, the pretrial services agency, and Manhattan bail review procedures and could not say whether Manhattan and Brooklyn were fully comparable (T.A. 382-84, 387). Judge Judd held that the *Bellamy* statistics could not be applied in this case since he could not analyze the statistics and opposing affidavits in *Bellamy* (which were never before the District Court); since the study contained an apparently inadequate sample of Supreme Court cases; and since the actual practices used in fixing bail in Kings County may differ from those used in New York (A. 394-95).

It is obvious that the *Wallace* plaintiffs never intended to rely exclusively on the *Bellamy* study, perhaps anticipating the evidentiary problems enunciated by Judge Judd. Instead they offered the live testimony of judges, lawyers, prisoners, and experts, in addition to numerous exhibits. This evidence was not before the state courts in *Bellamy*, nor in any other case.

Since this lawsuit is predicated on facts which were never before the state courts, those courts have never considered an identical claim. Nor does the decision in *Bellamy* in any way indicate that the state courts would refuse to consider, or summarily dispose of, plaintiffs' claims if presented with the new evidence. Plaintiffs clearly fail to meet the prerequisites which would allow this Court to excuse them from the exhaustion requirement on the ground of futility. *United States ex rel. Sero* v. *Preiser, supra* at 1130.

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* The statistical study in *Bellamy* was extensively criticized by defendants therein as well as in Hindelang, "On the Methodological Rigor of the Bellamy Memorandum," 8 Crim. Law Bull. 507 (1972).

CONCLUSION

For the above-stated reasons, the decision below should be reversed and the order, insofar as appealed from, be vacated.

Dated: New York, New York, May 6, 1975.

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

SUSAN D. CHIECO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for State Appellants herein. On the 6th day of May , 1975 , she served the/annexed three upon the following named persons :

DANIEL ALTERMAN
STEPHEN M. LATIMER
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003

Attorneys in the within entitled action by depositing 3 copies a true and correct ~~copy~~ thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the address within the State designated by them for that purpose.

Susan D. Chieco

Sworn to before me this
6th day of May , 197

Margery Evans Reifler
Assistant Attorney General
of the State of New York